Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent	MB Docket No. 10-71

REPLY COMMENTS OF CENTURYLINK

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CenturyLink submits these reply comments in response to the *Further Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

INTRODUCTION AND EXECUTIVE SUMMARY

As CenturyLink explained in its opening comments, the Commission should promptly eliminate its non-duplication and syndicated exclusivity rules (the "exclusivity rules").[2] These rules are outdated, and they no longer serve any legitimate purpose in today's legal and competitive landscape. Rather, they give broadcasters a monopoly on national syndicated and network programming, which broadcasters use to demand supra-competitive retransmission fees. Eliminating these exclusivity rules would help restore much-needed balance to retransmission negotiations by allowing MVPDs to negotiate with multiple broadcasters for network programming. That, in turn, should reduce rates and enhance MVPD competition, to the ultimate benefit of consumers. The Commission should further prohibit exclusivity agreements between networks and their broadcast affiliates, as they give rise to many of the same problems as the exclusivity rules. The Commission has ample legal authority to take these actions.

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[1] Report and Order and Further Notice of Proposed Rulemaking, *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, ¶ 40 (2014) ("FNPRM").

[2] *See* 47 C.F.R. § 76.92 *et seq.*

MVPDs of all sizes and types agree that this is the proper course of action. Verizon urges the Commission to eliminate the rules because they "prevent the marketplace for distribution of broadcast station programming from functioning like a normal market"; DIRECTV and DISH Network ask the Commission "to address the unfair leverage that broadcasters enjoy in retransmission consent negotiations"; and Time Warner Cable argues that the Commission should remove the "thumb on the scale in favor of broadcasters in carriage negotiations."[3]

Unsurprisingly, broadcasters have a different view. Their defense of the exclusivity rules is two-fold. *First*, the broadcasters half-heartedly suggest that the Commission lacks authority to eliminate the very same exclusivity rules that the Commission enacted in its own discretion, claiming that such authority is "questionable" or "doubtful."[4] But they are unable to cite *any* statutory language that can even plausibly be read to strip the Commission of this discretion. *Second*, the broadcasters argue the exclusivity rules should be preserved as a policy matter, largely because they promote localism. In fact, the rules have the opposite effect. By shielding broadcasters from competition, the exclusivity rules contribute to lower quality local programming. If the Commission eliminates the exclusivity rules – as it should – broadcasters will face greater pressure to produce high-quality local programming to distinguish themselves from distant signals. In all events, the broadcasters' arguments cannot prevail in the face of the well-developed record that the exclusivity rules are harming consumers by contributing to excessive costs for programming content, fostering blackouts, and undermining the benefits of competition from smaller MVPDs.

[3] Verizon Comments, pp. 1-2; DIRECTV & DISH Network Comments, p. 1; Time Warner Cable Comments, p. 1.

[4] NAB Comments, pp. 2, 6.

I. The Commission Has Ample Legal Authority To Eliminate the Exclusivity Rules

As CenturyLink explained in its original comments (at 6-10), the exclusivity rules are not mandated by statute. They are a discretionary policy of the Commission, which the Commission may justifiably revisit as circumstances change. As the D.C. Circuit specifically held in *United Video, Inc. v. FCC*,[5] the text and history of the Copyright Act of 1976 – which established the compulsory copyright regime – confirm that "Congress . . . left the [exclusivity] question to the Commission's discretion."[6] In fact, the Copyright Act of 1976 expressly contemplates that the Commission may change the exclusivity rules, stating that royalty rates may be adjusted "*[i]n the event that the rules and regulations of the [Commission] are amended* . . . to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals" and "*[i]n the event of any change* in the rules and regulations of the [Commission] with respect to syndicated . . . exclusivity."[7] Congress has never amended this critical statutory language. The Commission therefore retains authority to eliminate the exclusivity rules.

The broadcasters seeking to maintain the exclusivity rules are unable to cite any statutory language that strips the Commission of its discretion to eliminate the exclusivity rules. Instead, they argue that various congressional statements issued in the 25 years since *United Video* somehow strip the Commission of that discretion.[8] But only legislation enacted by Congress

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[5] 890 F.2d 1173 (D.C. Cir. 1989).

[6] *Id*, pp. 1185-86.

[7] 17 U.S.C. § 801(b)(2)(B)-(C) (emphases added); *see also* Time Warner Cable Comments, pp. 15-17.

[8] *See*, *e.g.*, NAB Comments, pp. 6-13 (relying on "the history since 1988 of repeated congressional and Commission reliance on the Rules' existence and scope"); Sinclair Comments, pp. 10-11 (relying on legislative history for the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")).

binds the Commission, not statements in committee reports untethered to any statutory proscription.[9]

In any case, the legislative history on which the broadcasters rely is not persuasive. Broadcasters such as Sinclair primarily rely on a single statement in the legislative history of the 1992 Cable Act that certain "'[a]mendments or deletions'" of the exclusivity rules would be inconsistent with the "'regulatory structure'" of that Act.[10] But, as explained in CenturyLink's initial comments (at 8-10), in context, that statement addressed a different issue: a desire to protect the carriage rights of local broadcasters who elect must-carry. The Senate did not consider situations where local broadcasters that choose retransmission consent cause negotiation impasses by demanding exorbitant retransmission fees, and it certainly did not express a desire to require exclusivity rules in such situations.

Broadcasters also rely on a series of statements in the legislative history of the Satellite Home Viewer Act of 1988[11] and its reenactments.[12] This legislative history explains that, to promote localism, Congress limited the compulsory statutory license for satellite providers to prevent the importation of distant network broadcasts except in the case of households that

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[9] *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. . . . [J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.").

[10] *See, e.g.*, Sinclair Comments, p. 10 (quoting S. Rep. No. 102-92, p. 38 (1991)).

[11] Pub. L. No. 100-667, tit. II, 102 Stat. 3935, 3949.

[12] *See* NAB Comments, pp. 9-13 (citing Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, div. B, § 1000(a)(9), App. I, tit. I, 113 Stat. 1501, 1536, 1501A-521, 1501A-523 ("SHVIA"); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, div. J, tit. IX, 118 Stat. 2809; and Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218).

cannot receive local network broadcasts ("unserved households").[13] But Congress's decision to promote localism by limiting satellite providers' statutory license says little about whether Congress intended to strip the Commission of its discretion to modify the exclusivity rules.[14] In fact, SHVIA did not direct the Commission to enact specific exclusivity rules for satellite providers, but instead just extended the existing exclusivity rules to the retransmission of nationally distributed superstations (and left to the Commission's discretion whether to apply those rules more broadly).[15] Congress never intended to revoke the Commission's discretion to modify or eliminate the exclusivity rules.

Moreover, NAB incorrectly states (at 11, 39) that there is a "structural asymmetry" because the exclusivity provisions that apply to most MVPDs are regulatory and thus can be modified by the Commission, while the exclusivity provisions that apply to satellite providers are statutory and thus cannot be modified by the Commission. As we have explained, the exclusivity rules are regulations that the Commission has the authority to abolish for *all* MVPDs. While other statutory restrictions may apply to the importation of distant signals for satellite

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[13] *See*, *e.g.*, H.R. Rep. No. 108-660, pp. 11-12 (2004) (explaining that a "purpose of the unserved household limitation is to confine the abrogation of interests borne by copyright holders and local network broadcasters to only those circumstances that are absolutely necessary").

[14] *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

[15] *See* 47 U.S.C. § 339(b). At one point, CenturyLink's initial comments (p. 7; *but see id.* n.15) inadvertently suggested that Congress required the Commission to apply the same exclusivity rules to satellite carriers for all broadcast stations as were applied to other MVPDs, whereas Congress did so only with respect to nationally distributed superstations. This does not affect the analysis because, regardless of whether Congress directed the Commission to enact the same exclusivity rules for satellite carriers for all broadcast stations or only for nationally distributed superstations, the point remains that Congress did not direct the Commission to enact specific exclusivity rules.

carriers, DIRECTV and DISH Network detail additional reforms that the Commission can make to ensure these other statutory restrictions do not result in an uneven playing field.[16]

II. The Exclusivity Rules Harm Consumers

Numerous MVPDs have explained how the exclusivity rules are harming consumers by raising costs and contributing to blackouts. Elimination of the exclusivity rules will provide immediate relief because, as broadcasters have explained, many affiliation agreements would allow MVPDs to negotiate retransmission agreements with non-local broadcasters if the exclusivity rules are eliminated.[17] The ability to negotiate competitive retransmission fees should result in cost savings to consumers. NAB itself provides a telling example: retransmission fees are 50% to 75% lower in the few markets where MVPDs can already negotiate with multiple broadcast-affiliates of the same network.[18] The Commission should eliminate the exclusivity rules so that those same cost reductions are realized across the board, which will inure to consumers' benefit.

CenturyLink further urges the Commission to take note of a perhaps less obvious (but no less important) way in which the exclusivity rules are harming consumers: these rules disproportionately harm new entrant MVPDs and inhibit MVPD competition. As CenturyLink explained in its initial comments (at 5-6, 15), small MVPDs cannot credibly threaten a blackout in retransmission fee negotiations. Those smaller providers have no choice but to maintain "must-have" network programming for consumers to consider them a viable option; moreover,

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[16] DIRECTV & DISH Network Comments, p. 4.

[17] *See, e.g.*, NAB Comments, pp. 30-32.

[18] NAB Comments, pp. 36-37 (explaining that, in one market, retransmission fees were $0.12/subscriber in areas where MVPDs could negotiate with a significantly viewed station but were $0.45/subscriber in areas where MVPDs could negotiate with only a single broadcaster); *see also id.*, Appendix B ("Compass Lexecon Report"), ¶ 47.

they have too few subscribers for a blackout to affect a broadcaster meaningfully.[19] As a result, small MVPDs pay retransmission fees that can be more than twice the amount that larger MVPDs pay *for the same content in the same markets*.[20] The exclusivity rules therefore discourage entry by new MVPDs and conflict with the Commission's policy of fostering facilities-based video competition.

Broadcasters have not acknowledged this problem in their comments, let alone provided an explanation or a solution. Instead, broadcasters – including Sinclair, the owner of 167 television stations in 77 markets reaching nearly 40% of the public – claim that they are disadvantaged in retransmission negotiations with large MVPDs (a point those parties vigorously dispute),[21] without addressing the very serious disadvantages faced by small MVPDs.[22]

III. There Is No Valid Economic or Policy Justification for the Exclusivity Rules

As CenturyLink has explained (at 10-18), the exclusivity rules were enacted more than 40 years ago under far different circumstances. The original justifications for these rules – in particular, the legal rules that allowed cable systems to retransmit broadcasts without consent – no longer exist. Broadcasters have attempted to justify the rules on different grounds, but those grounds do not provide a valid basis to retain the rules in view of the documented harm they cause consumers.

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[19] *See also, e.g.*, USTelecom Comments, p. 2; NTCA Comments, p. 6.

[20] *See* William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements* 5-13 (May 18, 2010) (explaining that smaller MVPDs have less bargaining power than large MVPDs, and concluding that, based on available data, "it appears that the average retransmission consent fee paid by small and medium sized cable operators is more than twice as high as the average retransmission consent fee paid by large cable operators"), *attached as exhibit to* American Cable Association May 18, 2010 Comments.

[21] *See, e.g.*, Time Warner Cable Comments, p. 8.

[22] *See* Sinclair Comments, p. 7.

A. The Exclusivity Rules Do Not Promote Localism; They Harm It

Broadcasters argue that the exclusivity rules promote localism by ensuring that they maintain a certain level of revenue from an undivided local audience.[23] But, in the absence of the exclusivity rules as to national and syndicated programming, local channels' value will depend *more*, not less, on the consumer interest in their local programming. Stations that have better local programming will have more leverage in retransmission consent negotiations without the exclusivity rules. Thus, as CenturyLink has explained (at 16-17) and as the Commission has found, localism is better served not by guaranteeing local broadcasters a captive audience but rather by encouraging vibrant competition: "The local community benefits from competition among broadcast television stations in the form of higher quality programming provided to viewers."[24] Thus, eliminating the exclusivity rules – and subjecting local broadcasters to greater competition – will promote localism and benefit consumers. This remains true even though some local broadcasters may founder in the face of competition and may suffer reductions in revenue. Indeed, in this docket, the Commission has already "reject[ed] the suggestion that the public interest is served merely because an arrangement generally increases the funds available to broadcasters, if that arrangement otherwise is anticompetitive and potentially harmful to consumers."[25]

NAB further provides (at 40-50) several examples where broadcast affiliates of the same network currently co-exist without exclusivity protection in order to show the supposed harms

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[23] *See* NAB Comments, pp. 15-19; Sinclair Comments, pp. 3-5, 8.

[24] Report and Order and Order on Reconsideration, *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd 2010, ¶ 97 (2008); *see also* Time Warner Cable Comments, pp. 12-14.

[25] FNPRM ¶ 17.

that would befall broadcasters if the exclusivity rules were eliminated. But these examples show that local broadcasters can (and do) survive without exclusivity protection, and therefore undercut broadcasters' argument that the exclusivity rules are necessary to the survival of local broadcasting. Although NAB would obviously like to see its members shielded from competition so they could increase their revenues even further, the Commission has already rejected this argument as a basis for the exclusivity rules,[26] which improperly places the interest of broadcasters ahead of competition and consumers.

B. The Exclusivity Rules Can Be Eliminated Without Upsetting a "Mosaic" of Regulation

Broadcasters repeatedly claim that the exclusivity rules are part of a "mosaic" of regulation that cannot be altered piecemeal. In particular, they argue that the compulsory statutory license deprived broadcasters of the protections of copyright law and that the exclusivity rules are a "counterweight" to that deprivation.[27] The premise of this argument is unsound. In *Fortnightly Corp. v. United Artists Television, Inc.*[28] and *Teleprompter Corp. v. CBS, Inc.*,[29] the Supreme Court held that broadcasters were not entitled to copyright protection against cable systems rebroadcasting their signals. The 1976 Copyright Act gave broadcasters such protection but, at the same time, the Act imposed the statutory license.[30] Broadcasters therefore have never had copyright protection as to the retransmission of their signals by MVPDs without also being subject to the compulsory statutory license.

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[26] *See, e.g.*, NAB Comments, p. 24 ("An absence of exclusivity produces the opposite outcome: Local stations are unfairly denied revenue they would otherwise have booked . . . .").

[27] *E.g.*, NAB Comments, pp. 30, 50-57; Sinclair Comments, pp. 4-5.

[28] 392 U.S. 390 (1968).

[29] 415 U.S. 394 (1974).

[30] 17 U.S.C. §§ 111, 501.

In any case, the retransmission consent regime provides broadcasters protection even without the statutory license. The retransmission consent requirement forces MVPDs to seek permission to retransmit a broadcaster's signal in the same way that copyright law would require MVPDs to seek permission from the beneficial owner of a copyright.[31] There is therefore no need to retain the exclusivity rules to "compensate" broadcasters for the supposed loss of any rights they may have held under a hypothetical copyright regime.

NAB further claims (at 52-56) that the retransmission consent requirement is insufficient standing alone because MVPDs would be able to "make an 'end run' around a local station by seeking broad retransmission consent from an out-of-market station." But, as CenturyLink has shown (at 6, 17), importing distant channels is decidedly a second-best solution for an MVPD, as it will not be able to show local programming, so local broadcasters still retain significant bargaining power.

C. The Exclusivity Rules Are Not Pro-Competitive

Broadcasters' attempts to cast the exclusivity rules as pro-competitive are not persuasive. *First*, they state that the rules prevent MVPDs from "opportunistic behavior" such as "'free-riding on broadcast stations' efforts and investments.'"[32] But, of course, there can be no free-riding in light of the retransmission consent requirement. MVPDs must find a willing seller of programming and then pay sufficient compensation for the rights to carry that programming.

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[31] *Compare* 47 U.S.C. § 325(b)(1) *with* 17 U.S.C. § 501(b). *See also* United States Copyright Office, *A Report of the Register of Copyrights: Satellite Home Viewer Extension and Reauthorization § 110 Report*, p. 51 (Feb. 2006) ("Requiring the consent of a television broadcaster before retransmitting its daily program could be viewed as one way of protecting the copyright owner's exclusive right of public performance."), *available at* http://www.copyright.gov/reports/satellite-report.pdf.

[32] NAB Comments, p. 20 (quoting Compass Lexecon Report ¶¶ 10-11).

Second, broadcasters argue that the exclusivity rules promote economies of scale and scope by ensuring a broadcaster has an undivided local audience.[33] Eliminating the exclusivity rules would accomplish that objective more efficiently. Instead of dictating the scale of broadcasters through the area of exclusivity allowed under the exclusivity rules, elimination of the rules would allow the scale of broadcasters to be determined by market conditions. Notably, there will always be a place for broadcasters that provide quality local programming that is desired by consumers.

Third, broadcasters claim that the exclusivity rules – which, as they admit, are competitive restraints – do not have anti-competitive effect because the marketplace for video programming is sufficiently competitive.[34] Even the Compass Lexecon Report provided by NAB explains (at ¶ 23), however, that "exclusive territories[] can raise competitive concerns" where there is a lack of sufficient "competition in the markets in question and, in particular, significant market power by the firm(s) engaging in exclusivity." Contrary to NAB's arguments, that is the case here. As CenturyLink has detailed (at 4 & n.7), network programming is "must-have" for MVPDs – a fact that broadcasters exploit in the one-sided retransmission consent negotiations. It thus disserves the public interest to retain the exclusivity rules.

IV. The Commission Should Eliminate Exclusivity Agreements

CenturyLink has explained (at 18-22) that, in addition to eliminating the exclusivity rules, the Commission should prohibit exclusivity agreements between networks and broadcasters. Other commentators – including at least the American Cable Association, Cablevision, ITTA,

[33] *E.g.*, *id.*, pp. 23-24.

[34] *E.g.*, *id*, pp. 25-26 (citing Compass Lexecon Report ¶¶ 23-24).

and Mediacom – have echoed this request.[35] Those parties, moreover, agree that the Commission has authority to take this action.[36]

As these Commenters and CenturyLink have explained, while eliminating the exclusivity rules is an important first step that would allow negotiation with distant broadcasters to break some retransmission impasses, the Commission needs to prohibit the underlying exclusivity agreements to ensure that MVPDs are always able to engage in negotiations with multiple broadcasters. That will take away the artificial monopoly currently enjoyed by broadcasters, and reduce retransmission rates to the ultimate benefit of consumers.

CONCLUSION

The Commission should eliminate its exclusivity rules and should prohibit exclusivity agreements.

[35] ACA Comments, pp. 9-14; Cablevision Comments, pp. 8-9; ITTA Comments, pp. 8-9; Mediacom Comments, pp. 14-18.

[36] ACA Comments, pp. 9-14; Cablevision Comments, pp. 8-9; Mediacom Comments, pp. 14-18.

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Respectfully submitted,

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